Oil Capital Electric *and* International Brotherhood of Electrical Workers, Local Union No. 584. Cases 17–CA–17290 and 17–CA–17418

July 31, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On May 19, 1997, Administrative Law Judge John H. West issued the attached decision finding, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act when it refused to hire union applicants; and violated Section 8(a)(1) when it interrogated a job applicant. The Respondent filed exceptions and a supporting brief. The General Counsel filed partial exceptions, a supporting brief, and a brief in support of the judge's decision.

On May 11, 2000, the National Labor Relations Board issued its decision in *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), setting forth the framework for analysis of refusal-to-hire and refusal-to-consider allegations. On June 7, 2000, the Board remanded this case to the judge for further consideration in light of *FES* including, if necessary, reopening the record to obtain additional evidence on (1) the determination of whether there were available job openings at the time the alleged discrimination occurred and (2) whether the applicants had training and experience relevant to the announced or generally known requirements of the job openings.

On February 21, 2001, the judge, noting that the Respondent and General Counsel each agreed that he should not reopen the record for additional evidence or exhibits, issued the attached supplemental decision affirming his conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act. The Respondent filed exceptions and a supporting brief. The General Counsel filed a supplemental brief with the postremand brief submitted to the judge.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

This case arises in the context of a salting campaign conducted by the Charging Party Union in an attempt to organize the employees of the Respondent, an electrical contractor with a facility in Tulsa, Oklahoma. From January through June 1994, several union members sought to apply for electrician positions with the Respondent and were denied employment.

The judge found that the Respondent violated Section 8(a)(3) when it refused to hire 21 union applicants who appeared en masse at the Respondent's office to apply for jobs. Additionally, the judge found that the Respondent violated Section 8(a)(3) when it refused to hire seven union applicants who individually sought to apply for jobs at various times. Finally, the judge found that the Respondent violated Section 8(a)(1) when it interrogated a union applicant about his and others' union activities. For the reasons stated below, we reverse the judge's findings that the Respondent violated the Act, and shall dismiss the complaint in its entirety.

1. On March 1, 1994, a group of 21 union applicants[2] appeared en masse at the Respondent's office to apply for employment. The Respondent advised that it was not accepting employment applications.

After quoting the analytical framework of *FES*, the judge summarily concluded that the General Counsel had proven the three required elements of a refusal to hire violation, i.e. (1) the Respondent was hiring at the time of the alleged unlawful conduct, (2) the applicants had experience relevant to the generally known requirements of the positions for hire; and (3) antiunion animus contributed to the decision not to hire the applicants. See *FES*, supra at 12.

In its exceptions, the Respondent contends that the judge erred in finding that the General Counsel carried his burden of proving, as required by *FES*, that the "applicants had the experience or training relevant to the announced or generally known requirements" of the jobs for which they applied. Id. We find merit in the exception.

From January through June 1994, the Respondent was seeking to hire, and did hire, approximately 34 journeymen electricians and apprentice electricians. Clearly, the "generally known requirements" of the available posi-

[1] The Respondent and General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The 21 alleged discriminatees are Chris Arena, Roger Harris, Mile Highwood, Dan Miller, Gerald Molloy, Jim Rogers, Dennis Lawrence, Weldon Long, Lawrence Houser, Steve Morgan, Kenneth Nelson, Ron Pitman, Roy Sheppard, Dana Benton, Bobby Risenhoover, Danny Risenhoover, Dusty Oldham, Jerry Porter, Gary Ward, Jim Pitts, and Charles Lackey Jr.

tions entailed some experience or training as a journeyman or apprentice electrician. No party disputes this.

Although the judge found that the applicants had experience relevant to the generally known requirements of the positions for hire, he failed to refer to any evidence supporting this finding. Our review of the record reveals that, with but one exception, there is, in fact, no such evidence. The union applicants did not testify at the trial. Nor did the General Counsel provide any documentary evidence as to their experience or training. The one exception concerns Charles Lackey Jr., whose employment application was introduced into evidence not by the General Counsel, but the Respondent. In its brief, the Respondent concedes that Lackey possessed the requisite experience or training. Despite the paucity of evidence on this issue—a matter specifically raised in our remand Order—the General Counsel elected to rest on the present record and did not seek to adduce additional evidence.

FES plainly places on the General Counsel the burden to show the applicants' relevant experience or training. Here, there is simply no evidence to carry this burden with respect to 20 of the 21 applicants. Therefore, with respect to these 20 applicants, we find that the General Counsel has not established one of the three critical elements of a discriminatory refusal-to-hire violation. With respect to the 21st applicant (Lackey), we find, for the reasons set forth in the next section of our decision, that the General Counsel has not established a separate critical element, i.e., that antiunion animus contributed to the adverse employment action.[3]

Accordingly, we reverse the judge's findings that the Respondent violated Section 8(a)(3) and (1) when it refused to hire the 21 union applicants.

2. The following union applicants sought employment with the Respondent between January and March 1994: Lonnie Turnipseed and Cecil Blackwood on January 12; Larry Spencer on January 13; Kevin Stone on February 21; and John Bell and Larry Crouse on March 22.[4] The Respondent refused to hire them.

The judge found that the Respondent violated Section 8(a)(3) and (1) when it refused to hire these six individuals. In finding that the refusal to hire them was unlawfully motivated, the judge relied on the following: (1) the Respondent's alleged interrogation of union applicant Gary Stottlemyre II; (2) contrary to the Respondent's claim that it held applications for only 14 days, it kept some applications on file beyond 14 days; (3) the applicants whom the Respondent hired "were known individuals in that they were referred . . . by a source or they were former employees"; and (4) contrary to the testimony of the Respondent's president, the "not-taking-applications" sign was not posted when Bell and Crouse sought employment.

The Respondent has excepted to the judge's finding of these violations. For the reasons set forth below, we find merit in this exception.

First, for the reasons stated in section 4 of this decision, we have found that the questioning of Stottlemyre by the Respondent's president, James Lewis, was not coercive and therefore does not violate Section 8(a)(1) of the Act. As such, Lewis' questioning does not provide a basis for finding animus with regard to the hiring decisions. Moreover, the questioning occurred significantly *after* the allegedly unlawful hiring decisions. The questioning occurred on June 7, 1994, 2-1/2 months after Bell and Crouse sought employment, 3-1/2 months after Stone sought employment, 4-1/2 months after Spencer, Turnipseed, and Blackwood sought employment, and 3 months after Lackey sought employment. Under these circumstances, Lewis' questioning of Stottlemyre, even if unlawful, cannot serve as evidence of unlawful motivation for the earlier hiring decisions.

Second, the judge inferred unlawful motivation based on his finding that, although the Respondent informed the union applicants that their applications were valid for only 14 days, it hired 2 nonunion applicants more than 2 weeks after they filed their applications. Contrary to the judge, we find that the record does not contain convincing evidence that the 14-day rule was applied in such a disparate way as to support a conclusion of unlawful discrimination.

The judge found that, of the 38 employees and foremen the Respondent hired between January and June 1994, 2 of them—Larry Tisdale and Richard Tweed—were hired more than 2 weeks after they filed their applications. The judge, however, ignored the Respondent's legitimate explanations for these departures from the 14-day rule. Under the Respondent's affirmative action program, minority applicants' applications remain active beyond 14 days. Tisdale was a minority applicant. Tweed applied while he was attending a vocational school that teaches special skills. The Respondent actively supports the acquisition of these special skills, which are not learned in apprenticeship schools.

The record shows that the Respondent's treatment of Tisdale's application was consistent with its stated hiring

[3] In light of these findings, Member Bartlett finds it unnecessary to address whether FES correctly identified all the elements necessary to establish a refusal-to-hire violation. Specifically, he finds it unnecessary to address whether, in order to establish a refusal-to-hire violation, the General Counsel must also prove that the alleged discriminatees are genuine or bona fide applicants.

[4] A seventh applicant, Gary Stottlemyre II, is discussed infra.

policy and that the Respondent provided a legitimate business explanation for its treatment of Tweed's application. Thus, we do not agree with the judge that the hiring of Tisdale and Tweed provides evidence that the Respondent's 14-day rule was applied in such a disparate way as to support a conclusion of unlawful discrimination. Rather, the record substantiates the Respondent's contention that its hiring policy is to accept employment applications only when job openings are anticipated and to maintain those applications in its files for 14 days, except in instances provided for under its policy or for legitimate business reasons.[5]

Third, the judge found that the Respondent's practice of hiring only former employees or persons referred by a known source supported a finding of unlawful motivation. We disagree.

Contrary to the judge's finding, the Board has held that an employer may lawfully apply a policy of hiring only former employees and persons referred by known individuals. See *Kanawha Stone Co.*, 334 NLRB No. 28, slip op. at 2–3 (2001) (respondent rebutted General Counsel's prima facie case by showing that its hiring was consistent with the policy of hiring only former employees, relatives of employees, or referrals by employees).

The judge provided no rationale for why, in the circumstances of this case, we should find that the Respondent's policy (hiring only former employees or persons referred by a known source) was instituted or applied to avoid hiring union applicants. The record fails to support such a finding. As we discuss below, the Respondent, in fact, hired a number of union applicants.

Finally, the judge found, contrary to the testimony of President Lewis, that a sign reading, "APPLICATIONS ARE *NOT* BEING ACCEPTED *AT THIS TIME*" was not posted when Bell and Crouse sought employment (emphasis in original). Based on his finding that Lewis "was less than truthful" about why Bell and Crouse were not allowed to submit applications, the judge inferred an unlawful motive.[6]

In the circumstances of this case, we do not agree. The record demonstrates that since March 1990, after the Respondent became a nonunion contractor, the Respondent hired at least six applicants[7] whose applications showed union affiliation. All six of these applicants listed on their applications that they participated in the Union's apprenticeship program and, of those, three listed union employers in their work histories. Several of these applicants were hired during the January to June 1994 period covered by the General Counsel's complaint. Given the Respondent's repeated hiring of union applicants, the Respondent's untruthful claim concerning the "not hiring" sign is not sufficient to warrant the inference that it unlawfully refused to hire employees because of their union support or activities.

In sum, we find that the record, fairly considered as a whole, does not support the judge's conclusion that the Respondent's hiring decisions were unlawfully motivated. Accordingly, we reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) when it refused to hire the six alleged discriminatees.[8]

3. On June 7, 1994, Gary Stottlemyre II went to the Respondent's facility seeking employment. The Respondent did not hire Stottlemyre. The judge found that the Respondent violated Section 8(a)(3) and (1) when it refused to hire Stottlemyre. The Respondent has excepted. We find merit in the exception.

In his supplemental decision, the judge reiterated his finding of a violation, even though, as he observed, the record shows that the Respondent did no hiring on or after June 7, 1994, when Stottlemyre applied. Citing footnote 16 in the *FES* decision, the judge stated that the General Counsel would have the "opportunity to demonstrate at the compliance stage when Stottlemyre would have been hired to fill an opening."

The judge's reliance on footnote 16 in *FES* is misplaced. As an initial matter, *FES* clearly requires the General Counsel to show at the hearing that there was at least one available opening in order to find a refusal to hire violation. *FES*, supra at 12. Footnote 16 addresses the situation where the General Counsel has established the existence of available openings, but the number of discriminatees exceeds the number of available openings. In footnote 16, the Board makes clear that the General

[5] It appears from documentary evidence in the record that the Respondent hired a third individual, Jamie Knight, more than 14 days after he filed his application. There is no explanation for this apparent departure from the 14-day rule. Neither the General Counsel nor the judge made reference to Knight's hiring.

Even assuming that Knight's hiring represented an unexplained departure from the 14-day rule, such an isolated occurrence over the course of 5 months is simply not sufficient evidence to establish unlawful motivation. *J. O. Mory, Inc.*, 326 NLRB 604, 605 (1998) (one unexplained departure from legitimate hiring policy did not prove disparate treatment or pretext).

[6] The sign was posted when Spencer and Stone sought employment. Based on discrediting Lewis' testimony, the judge found that the sign was not posted when Bell and Crouse sought employment. Although the judge did not mention their testimony, Turnipseed and Blackwood also testified that the sign was not posted when they sought employment.

[7] The six union-affiliated applicants and their dates of hire are as follows: Wayne Clark in March 1990, Virgil Holloway in July 1993, Bernard Gardipe in September 1993, Terry Clark and Vaughn Bearden in January 1994, and Bill Fryar in March 1994.

[8] For these same reasons, we conclude that the General Counsel has not established that antiunion animus contributed to the refusal-to-hire Lackey, the 21st applicant discussed above.

Counsel may refer to compliance "which of the discriminatees would have been hired to fill the available openings" only "where the number of discriminatees exceeds the number of available openings."

Here, as the judge recognized, the General Counsel has failed to show that there were *any* openings when Stottlemyre applied or thereafter. Thus, because the General Counsel failed to establish the critical element of an available opening for Stottlemyre, we reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Stottlemyre.[9]

4. The judge found that the Respondent unlawfully interrogated Stottlemyre on June 7, 1994. The Respondent excepts to this finding. For the reasons that follow, we agree with the Respondent that the questioning of Stottlemyre was not coercive.

On June 7, 1994, when Stottlemyre came to the Respondent's facility to seek employment, he spoke to the Respondent's president, James Lewis. Lewis said that Stottlemyre's name sounded familiar to him and asked if Stottlemyre's father was a union member. Stottlemyre answered "yes." Later in the conversation, Stottlemyre said he needed work. Lewis then asked why the Union was not helping him. Stottlemyre replied that the Union had expelled him from its apprenticeship program when he was incarcerated for a crime involving drugs, and that the Union refused to reinstate him upon his release from prison.

We recognize that *M. J. Mechanical Services*, 324 NLRB 812 (1997), states that "questioning a job applicant about his union preferences during a job interview is inherently coercive and unlawful." We note the apparent tension between this statement and the general rule that the issue of whether a given questioning is coercive is to be decided on the basis of all the surrounding circumstances. See *Rossmore House*, 269 NLRB 1176 (1984), affirmed sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). We do not resolve the issue concerning the validity of the above statement in *M. J. Mechanical*. Rather, accepting at face value that statement, we do not believe that it applies to the conduct in the instant case. The first question herein was about the union membership of the applicant's father, not the applicant himself. The second question simply asked why the Union was not assisting the applicant. Thus, the questioning does not fall within the intended scope of *M. J. Mechanical*.

Furthermore, the questioning has not been shown to be coercive under *Rossmore House*. Given the reversal of the judge's 8(a)(3) findings, including his finding that the Respondent unlawfully refused to hire Stottlemyre, there is no background of discrimination. Further, as we emphasize in our decision, there is no showing of employer hostility to union activity. With respect to the nature of the information sought, the first question concerning Stottlemyre's father represented little more than idle curiosity prompted by Lewis' recognition of the name. In addition, there is nothing in the second question to suggest that Stottlemyre reasonably would be coerced. As stated above, that question, as reasonably perceived, was aimed only at ascertaining why the Union was not helping Stottlemyre secure work. Stottlemyre truthfully responded that his drug conviction resulted in his expulsion from the union apprenticeship program. Under all the circumstances, we find that the Respondent's questioning of Stottlemyre was not coercive. Accordingly, we shall dismiss the complaint allegation that Lewis unlawfully interrogated Stottlemyre.

ORDER

The complaint is dismissed.

Dated, Washington, D.C., July 31, 2002

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Peter J. Hurtgen, Chairman

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Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

I join my colleagues in reversing the judge's findings that the Respondent unlawfully refused to hire 28 job applicants. However, unlike my colleagues, I would adopt the judge's finding that the Respondent unlawfully interrogated job applicant Gary Stottlemyre II, given the nature of the questions asked and the setting in which they were posed.

On June 7, 1994, Stottlemyre went to the Respondent's facility seeking employment. He spoke to James Lewis, the Respondent's president. Lewis remarked that Stottlemyre's name sounded familiar to him and asked if Stottlemyre's father was a union member. Stottlemyre answered "yes." Later in the conversation, Stottlemyre said that he needed work. Lewis then asked, "Couldn't [Stottlemyre's] Union help him?" Stottlemyre replied that the Union had expelled him from its apprenticeship program when he was incarcerated for a crime involving drugs, and the Union refused to reinstate him upon his release from prison.

[9] The complaint did not allege, and the judge did not find, that the Respondent unlawfully refused to *consider* Stottlemyre for employment. Accordingly, we do not pass on that issue.

Under Board law, it is well settled that questioning a job applicant about his or her union affiliation and preferences during a job interview is inherently coercive and unlawful. *M. J. Mechanical Services*, 324 NLRB 812, 816 (1997).[1]

My colleagues contend that Lewis's questions do not fall within the scope of *M. J. Mechanical Services*. In parsing Lewis's statements, however, they overlook the pivotal fact that

> an employment interview is not an abstract discussion forum, or an occasion for chance or casual conversation, but is a session of serious import at which the employer deals with matters, and propounds corresponding inquiries, designed to determine the suitability for employment, in the employer's eyes, of the applicant being interviewed.

Bendix-Westinghouse Automotive Air Brake Co., 161 NLRB 789, 792 (1966) (citation omitted).

Here, Lewis's conversation with Stottlemyre about employment with the Respondent was tantamount to a job interview. During the conversation, Lewis questioned Stottlemyre about his father's and his own relationship with the Union.

These questions were inherently coercive. First, with respect to Lewis's question about Stottlemyre's father's Union affiliation, a job applicant could reasonably interpret this question as an employer's way of extracting information about his *own* Union affiliation, preferences, or sympathies. Second, Lewis's question regarding the Union's "help" with Stottlemyre's employment search is *directly* related to Stottlemyre's relationship with the Union and his ability to obtain employment. A job applicant would reasonably construe the question to mean that his relationship with the Union is a relevant consideration in the employer's hiring decision. The question invites the applicant to disavow any affiliation with the union and, absent any disavowal, suggests that the affiliation would be disqualifying and employment not available. Accordingly, the Respondent's interrogation of Stottlemyre was inherently coercive and violated Section 8(a)(1) of the Act.[2]

[1] My colleagues emphasize that they are not overruling *M. J. Mechanical*.

[2] I note that this violation occurred significantly after the Respondent's hiring decisions regarding Lonnie Turnipseed, Cecil Blackwood, Larry Spencer, Kevin Stone, John Bell, Larry Crouse, and Charles Lackey. Therefore, it does not provide persuasive evidence that those earlier refusal-to-hire decisions were unlawfully motivated. See *Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 136 (1996).

With respect to the applicants named above, at best it might be argued that the reasons cited by the judge as evidence of unlawful motivation provide a basis to *suspect* unlawful motivation. Mere suspicion falls short of establishing unlawful motivation, however. See *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) "[s]ubstantial evidence . . . is more than a scintilla, and must do more than create a suspicion of the existence of fact to be established").

Dated, Washington, D.C., July 31, 2002

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

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DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. The charge in Case 17–CA–17290 was filed by the International Brotherhood of Electrical Workers, Local Union No. 584 (Union) on March 24, 1994, and the charge in Case 17–CA–17418 was filed by the Union on June 1. The latter was amended once and the former was amended twice. A consolidated complaint (complaint) was issued on August 31, 1994, alleging that Oil Capital Electric (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act), by interrogating job applicants in June 1994 concerning their union membership, activities and sympathies, and the union membership activities and sympathies of others, and Section 8(a)(1) and (3) by refusing to employ specified job applicants on specified dates during the period between January and June 1994 because they formed, joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Respondent denies violating the Act as alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, maintains an office and place of business in Tulsa, Oklahoma, and has been engaged in the construction industry as an electrical contractor. The complaint alleges, the Respondent admits and I find that at all times material herein, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

In *Oil Capital Electric*, 308 NLRB 1149 (1992), the National Labor Relations Board (Board) ordered the Respondent, upon request, to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative with respect to certain of Respondent's employees. It was pointed out by the administrative law judge in that case, that Respondent was an active member of the National Electrical Contractors Association (NECA); that between 1972 and 1987 Respondent was a party to a series of 8(f) prehire collective-bargaining agreements between the Union and NECA; that in 1987 Respondent unilaterally implemented the terms of NECA's last offer and the Union engaged in a strike against Respondent and other NECA members; that later in 1987 the Union unanimously won an election with respect to Respondent's employees and the Board issued a certification that the Union was entitled, under Section 9(a) of the Act to exclusive representation rights for the purposes of collective bargaining among certain of Respondent's employees; and that subsequently Respondent withdrew its recognition of the Union. As pointed out by General Counsel on brief, in 1993 the United States Court of Appeals for the Tenth Circuit denied enforcement of the Board's Order.

During the period involved here, Respondent at times posted a sign in its reception area which indicated "APPLICATIONS ARE NOT BEING ACCEPTED AT THIS TIME" (Emphasis in original). James Lewis, Respondent's president, testified that if Respondent had a need for someone the sign would be taken down and that while normally the sign would be taken down for a day and put back up the following day there were occasions when the sign was taken down in the morning and put back up the afternoon of that same day. Lewis also testified that Respondent, unlike a union contractor which can use the union hall to have employees referred to a job, relies on present employees to refer applicants, the yellow pages, other nonunion contractors which are faced with a reduction-in-force, Respondent's supervisors, newspaper ads, vo-tech schools, recruiters who participate in Respondent's affirmative action program, the ABC apprenticeship school which faxes out a list of names of apprentices who are available to work for ABC member contractors, customers, the unemployment office, and walk-ins which account for over 50 percent of its applicants. Further, Lewis testified that the purpose of the sign was to provide Respondent with a supply of applications that would be current or rather people who were currently interested in employment; that another reason for having the sign posted was that there was a lack of staffing at Respondent; that he conducted the interviews of the applicants; that when he was out of town, normally the sign was posted; and that Respondent has steadfastly enforced its policy to not take applications when the sign is posted.

It appears that sometime in the fall of 1993, Respondent hired Bernard Gardipe who indicated on his application for employment, Respondent's Exhibit 3, that one of his past employers was Local Union 444, IBEW from 1976 to 1984. On cross-examination Lewis testified that the three most recent employers which Gardipe listed on his application were nonunion contractors.

On January 7 Respondent hired Huey Bryant. Lewis testified that when he telephoned the employers listed on Bryant's application he was told by a person who identified himself as Bryant's uncle that Bryant "moves around quite a bit and he likes to work union."

On January 12 Robert Lon (Lonnie) Turnipseed, who has been a member of the IBEW for over 15 years, filed an application for employment with Respondent. When called by General Counsel Lewis testified that, as indicated by General Counsel's Exhibit 32, he wrote in the special comments section of the evaluation regarding this application that "no educational background provided, provide[d] only (1) years experience history and no [certificate of degree of Indian blood] C.D.I.B. card." Lewis also testified that he wrote on the application "Industrial Experience—Linder A/A hanger #6"; that Linder is a union contractor; that Turnipseed listed as educational background the JATC apprenticeship which is the union apprenticeship; and that in reviewing this application he was concerned about applicant's prior wage rate which exceeded what Respondent paid its journeymen. This applicant was not hired. Turnipseed testified that he is a member of the Union; that he went to Respondent's facility on January 12; that Charles Lackey or Tom Quigley at the Union told him to go to Respondent and fill out an application when the job he was working on was just about over and there was not a lot of work on it; that he arrived at Respondent's facility at about 9 a.m.; that he asked the receptionist at Respondent if he could fill out an application; that she got Lewis who gave him an application to fill out; that after he filled out his application he turned it in and Lewis came out, they went to a conference room and Lewis asked him about a prior employer, namely Linder & Associates, on a job at hanger 6 at American Airlines; that Lewis asked twice about Linder & Associates which is a union contractor; that Lewis asked him if he had a CDIB card because Respondent had a job in Tahlequah, Oklahoma, called Talking Leaves for the Cherokee tribe; that he did not have a CDIB card; that Lewis asked him about the job he was just finishing, Home Depot, where he worked for Lenore Rogers, which is not a union contractor; that he believed that he put the wages he earned at prior jobs on his application; that he put his union apprenticeship program on the application; and that he was not hired by Respondent. On cross-examination Turnipseed testified that it was his understanding that Respondent lost the bid on the aforementioned American Airlines hanger to the company that he worked for; and that when Lewis discussed a CDIB card he said that at the time he was only hiring for the Talking Leaves job in Tahlequah. Subsequently, Turnipseed testified that on his application he listed Tom Quigley and Charlie Lackey as references. When called by Respondent Lewis testified that he made an error on Turnipseed's evaluation sheet in indicating that no educational background was provided; that he spoke with Turnipseed late in the morning or in the early afternoon; that Turnipseed did fill out an application and Respondent was taking applications on that particular day; that he told Turnipseed that Respondent was looking for an employee with a CDIB card for the Talking Leaves project;

that he discussed the Linder/American Airlines hanger job with Turnipseed because Respondent had bid on that job; that one of the requirements of the Talking Leaves project was a CDIB card; and that at that time he was looking for a journeyman.

On January 12 Cecil Blackwood filed an application with the Respondent. Lewis testified that he wrote in the special comments section of the evaluation form, General Counsel's Exhibit 33, that "inadequate information provided[.] Past employee—rated below average[.] Very slow—low production." Lewis also testified that he was concerned that this applicant was paid more by prior employers than Respondent pays. This applicant was not hired. Blackwood testified that he is a Native American, specifically a Cherokee, and has a CDIB card; that he worked for Respondent for 2 weeks in 1983 or 1984 under a supervisor named Pollack when Respondent was a union contractor; that he went to Respondent's place of business around 4 p.m. on January 12; that he told Lewis that he wanted to fill out an application for the Cherokee nation job in Tahlequah; that Lewis gave him the application, saying that he had a man coming from Muskogee that day and if he did not show, Lewis would call Blackwood; that he told Lewis that he was a union member; that he had been laid off that day from Thompson Control; that when he worked for Respondent in 1983 or 1984 he was not formally evaluated or told by any supervisor that his production was low or that he was working very slow; that when he was laid off by Thompson Control he went to the Union and Tom Quigley suggested that he go to Respondent and if he got a job, he should go to work; that the last time he worked for a nonunion contractor was in 1965 and that contractor took his shop and men into the Union; that Lewis looked at the application in his presence and Lewis signed the application; and that as Lewis went over the application he did not indicate to Blackwood that the application was inadequate as far as the information that Blackwood was providing. When called by Respondent Lewis testified that he reviewed Blackwood's application and he told Blackwood that Respondent was looking for a journeyman for the Talking Leaves project; that Blackwood had a CDIB card; that Blackwood said he was interested in working on the Talking Leaves project; that Blackwood lived about 1-1/2 hours from Tahlequah; that he told Blackwood that he was going to interview another person who was coming from Muskogee, Terry Clark, for the job and if that did not work out, he, Lewis, would contact Blackwood; that Terry Clark had worked for Respondent before and lived near Tahlequah; that he saw Terry Clark about 5 p.m. on January 12 and offered him the job; that Terry Clark had the capacity to be a lead person and he was not sure if Blackwood, who was qualified for the job, had that capacity; that Blackwood had worked for Respondent twice previously when it was a union contractor and his production was deficient; that Respondent's foreman Bill Kuykendall told him regarding the second time that Blackwood was very competent, had a lot of experience but he worked really slow; and that at the time foremen were part of the bargaining unit and therefore they were reluctant to issue written reprimands. Lewis further testified that Blackwood never had any attendance problems when he worked for Respondent and he never disciplined Blackwood; and that he did not tell Blackwood that he was looking for a working foreman and that was not a criteria.

On the morning of January 13 Larry Spencer Jr., who has been a member of the IBEW since 1990, went to Respondent looking for employment. He testified that at the time he was an apprentice and he did not have a job; that Lackey suggested that he "put in" an application with Respondent; that at Respondent's facility he asked the receptionist if he could apply for the Talking Leaves job; that she pointed to a sign and said that Respondent was not taking applications at the time; that the receptionist then said "[w]ait a minute. Let me—I'll go back and talk to Jim Lewis for a second"; that he is a Native American, had a CDIB card and is a Kansas Kickapoo; that Lewis came out to the reception area and talked with him; that Lewis asked him if he was a journeyman or an apprentice and he told Lewis that he, Spencer, was an apprentice; that Lewis then asked him if he was attending the ABC School and he said that he was not but rather he was attending the JATC again at IBEW; that Lewis then pointed to a sign and said that Respondent was not taking applications; that when Lewis then asked him his qualifications he told him he had been working as an apprentice for 4 years; and that Lewis then said that his project manager on the job said that Respondent did not need any help at the time and Spencer could check back later if he wanted to. On cross-examination Spencer testified that he taped his conversation with Lewis without telling Lewis; that he gave the tape recording of his conversation with Lewis to Lackey; that he told Lewis that he, Spencer, was applying for the Talking Leaves job; that he did not stay in touch with Lewis although Lewis said that Respondent might need some help "down there" in the future; that he has worked for a nonunion contractor in the past and he received an exemption from Lackey so that he would not be fined; that the job he had after applying at Respondent was with a nonunion contractor and he used a tape recorder, with the knowledge and approval of the Union, with that employer; and that he tape recorded his interview with his next employer, which was a nonunion contractor and when he was laid off from that job he went to work for a union contractor. On redirect, Spencer testified that Lewis did not ask about his CDIB card and he did not tell Lewis about it. Subsequently, Spencer testified that Lewis first pointed to the aforementioned sign right after he told Lewis, in answer to a question, that he, Spencer, was attending the JATC. When called by Respondent Lewis testified that he did have a discussion with Spencer in the lobby of Respondent's facility one morning in January; that the "APPLICATIONS ARE NOT BEING ACCEPTED AT THIS TIME" sign was posted; that during the conversation he asked Spencer if he was an ABC apprentice and Spencer said that he was with the JATC; that the reason that he asked Spencer about the ABC apprentice was because he, Lewis was thinking about Talking Leaves which required an indentured apprentice; that he told him to stay in touch because he was a potential candidate for the Talking Leaves project in that Spencer had a CDIB card and he was an indentured apprentice. Lewis further testified that there was discussion after Spencer indicated that he was in JATC but he was not sure when he advised Spencer of the sign; and that at the end of the conversation he urged Spencer to check back with Respondent.

On or about January 13 Respondent hired Terry Clark. Lewis pointed out that on page 3 of his application, Respondent's Exhibit 5, Terry Clark listed IBEW apprentice school. Also Lewis testified that Terry Clark previously worked for Respondent when it was a signatory or union contractor and its employees were required to be members of the Union.

On January 17 Virgil Holloway left Respondent's Talking Leaves project to take a better paying job. Holloway testified that Lewis said at the time that Respondent needed employees—"all the help he could get"—for the Talking Leaves project. Lewis testified that at this time the Talking Leaves project was in a period of growth and when Blackwood came to Respondent looking for a job the Talking Leaves project was in the same period of growth.

According to General Counsel's Exhibit 34, on January 21 James Kevin Stone filed an application with the Respondent. Lewis testified that he wrote in the special comments section of the evaluation form, General Counsel's Exhibit 34, "has been receiving higher wages than . . . [Respondent] pays[.] May be unstable—like to travel to high paying out of town jobs." Lewis also testified that in 1994 Respondent had out of town jobs. The date on the application, January 21, 1994, has been crossed out and February 21, 1994 written on the application. Also the supplement to the application form, which is signed by Lewis, is dated "2/21/94." Lewis testified that he did not fill out the evaluation forms at the time of the applications.

On January 22 Respondent hired William Scott. Lewis testified that, as indicated on General Counsel's Exhibit 3, Scott was referred by Respondent's supervisor, George Tracy.

On January 28 Respondent hired Scott Koons. Lewis testified that, as indicated by General Counsel's Exhibit 4, Koons was referred by the apprenticeship director of ABC, Mike Taylor.

On January 29 Respondent hired Vaughn Bearden. Lewis testified that, as indicated by General Counsel's Exhibit 5, one of the reasons Bearden was hired was that he was referred by Fluor Daniels, which is a merit shop contractor, and he received a strong rating by Respondent's former employee Jim Powell. According to General Counsel's Exhibit 2, on January 31, Respondent hired Vaughn Bearden. Lewis pointed out that Bearden's application, Respondent's Exhibit 5, indicates under school JATC apprentice training.

On February 9 Respondent hired Rodney Rooks. Lewis testified that, as indicated by General Counsel's Exhibit 6, Rooks had a good reference by apprenticeship director (ABC) and Rooks lists as his source ABC.

On February 21 at about 10 a.m. James Kevin Stone, who had been a member of the IBEW for 5 years, went to Respondent's facility and asked a lady, apparently the receptionist, if Respondent had any work. He testified that she told him to come back at 1 p.m.; that when he went back at 1 p.m. he saw a sign posted indicating that Respondent was not taking applications; that at 1 p.m. he had a conversation with Lewis; that he spoke with Lewis about the work situation in Tulsa; that he filled out an application; that Lewis said that he had work coming up in Texas and Lewis asked him if he would be interested in traveling; that he told Lewis that he would travel; that Lewis asked him about his training and he, Stone, indicated that he had gone to Vo-Tech; that he discussed with Lewis that fact that he had worked with Respondent before after it was no longer a union shop; and that he was not hired. On cross-examination Stone testified that he did not tell Lewis that he was tape recording the conversation; that he used the Union's equipment, which was supplied by Lackey, to do the recording; that he took the tape back to the union hall; that he was unemployed when he went to Respondent looking for a job; that he did not tell Lewis that he was in the Union and he did not know that Lewis would know that the first company he, Stone, listed on his application was union; that company was a small contractor; that he did not believe that there was anything in his application which would have tipped Lewis off that he, Stone, was in the Union; that he did not go to the IBEW apprentice school; that he and Lewis discussed the fact that he, Stone, worked for Respondent before and he put this on the first page of the application; and that although the application asks for the applicant's last four employers, he did not list an employer in Texas which apparently was one of his last four employers. On redirect Stone testified that when he worked for Respondent in the past he never received any disciplinary warnings, write-ups, or suspensions; that when he was talking with Lewis he used "union terms" in that he said "time" and "scale." Lewis testified that Stone submitted his application on February 21; that when Stone filled out his application the "APPLICATIONS ARE NOT BEING ACCEPTED AT THIS TIME" sign was not posted; that he reviewed Stone's application with him in the conference room; that regarding the past employers listed on the application, he did not know if Burwich Electric is union or nonunion, he knew Cherokee Electric and M. C. Electric are nonunion; that nothing on the application communicated to him that Stone ever had any affiliation with any union; that he chose Dick over Stone because he believed that Dick was better qualified; that at the time of the application he did not realize that on page one of the application Stone indicated that he had worked for Respondent in the past; that Stone did not list Respondent in the employment history on the application; that Stone indicated that he was going to stay in the area so traveling was not a major concern; that he referred to Stone's traveling in his evaluation of Stone, namely, "may be unstable—like to travel to high paying out of town jobs" because willingness to travel is a plus if Respondent has an out of town job but a minus if the applicant is willing to leave the employ of Respondent to travel to another job. On cross-examination Lewis testified that Stone's traveling made him unstable and his prior wages were too high at other employers and those were considerations but the primary consideration was a comparison with the past history of Dick.

On February 21 Richard Tweed submitted an application, General Counsel's Exhibit 30. Lewis testified that he remembered that the sign regarding applications was not posted at that time; and that he had a discussion with Tweed. Tweed was hired on May 9, 1994. As set forth on his application, the source was ABC. On the evaluation Lewis wrote "will be available when school is out."

On February 25 Respondent rehired Jackie Dick. Lewis testified that, as indicated by General Counsel's Exhibit 7, Respondent will rehire when it needs a journeyman wireman.

When called by Respondent Lewis testified that Dick had a track record with Respondent in that foreman Gary Cheney gave Dick a good performance evaluation when Dick worked for Respondent in 1992; that he went with the personally proven track record; and that he chose Dick over Stone because of Dick's track record with Respondent.

On March 1 a group of about 25 individuals came to Respondent's facility and indicated that they wanted to apply for work. Lewis testified that on that particular day the sign was up and Respondent was not taking applications; that he was not sure if the individuals in this group were wearing Union paraphernalia; and that he did not give them applications and none were hired by Respondent. Charles Lackey testified that he, Mike Blanchard, who is a organizer, Tom Quigley, who is the Union's business agent, and 20 to 22 other people all of whom are IBEW members, went to Respondent's facility; and that this visit was captured on videotape, General Counsel's Exhibit 35. Lewis testified that when he told the group that "[w]e are shut down right now" he meant that Respondent was shut down on taking applications.

On March 1 Virgil Holloway went to the Talking Leaves project in Tahlequah and spoke with Respondent's job supervisor, who told him that he had to speak with Lewis who did all of the hiring. Holloway testified that he telephoned Lewis who said that he would not rehire Holloway because he left him at a time when he needed all of the help he could get, he "had done him wrong by leaving . . ." he had burned his bridges and what goes around comes around; that originally he was hired by Respondent in July 1993 to work on the Talking Leaves project; that he is a Native American (a Cherokee) and has a CDIB card; that in January he left to take a better paying job in Denver, Colorado; that he became a member of the Union in May 1993; that while he worked for Respondent he discussed the Union with employees at noon at the jobsite or after work; and that he kept Union stickers on the seat of his car. On cross-examination he testified that when he left the Talking Leaves job there was a lot of work there; and that he was not threatened or disciplined for talking to the employees about the Union. On redirect Holloway testified that when he hired on with Respondent he told his job supervisor, Cheney, that since the Talking Leaves project was only 40 hours a week, he, Holloway, might take a job involving overtime if one came up. Subsequently Holloway testified that he told his supervisor, Cheney, in January that the reason he was leaving was because he had a chance to earn quite a bit more money; that no one in management ever said anything to him about the fact that he was discussing the Union with other employees at the project; and that Cheney did ask him if he was a member of the Union. Lewis testified that Respondent has a practice that if an employee leaves a project of Respondent like Holloway did to work for more money, then that employee would not be rehired for Respondent's project because it would negatively impact the morale of those who stayed on the project; and that Respondent has taken this same approach with other named individuals.

On March 2 Respondent hired Michael Johnson. Lewis testified that, as indicated by General Counsel's Exhibit 8, Johnson was highly recommended by someone who works for Respondent.

On March 3 Respondent rehired David Calhoun. Lewis testified that, as indicated by General Counsel's Exhibit 10, this individual also worked for Fluor Daniel.

On March 4 Respondent hired Robert Reece. Lewis testified that, as indicated by General Counsel's Exhibit 11, Reece listed as his referral source ABC.

On March 7 Respondent hired Thomas Suttles. Lewis testified that, as indicated by General Counsel's Exhibit 12, Thomas' educational background was with ABC.

On March 9 Respondent hired Daniel Williams. Lewis testified that, as indicated by General Counsel's Exhibit 13, Williams was referred by Respondent's employee K. Cooper and the applicant received a strong rating from J. Hunt of Heritage Electric which is in the ABC.

On March 9 Respondent hired Richard Brockunier. Lewis testified that, as indicated by General Counsel's Exhibit 14, this applicant was referred by the ABC fax system. Lewis also testified that ABC would fax names of people who were in their apprentice program.

On March 10 Respondent hired Bill Fryar. Lewis pointed out that Fryar's application, Respondent's Exhibit 6, lists IBEW apprenticeship school and lists Wayne Clark as the person who referred him.

On March 14 Respondent rehired Richard Stratton. Lewis testified that, as indicated by General Counsel's Exhibit 15, Respondent's supervisor rated Stratton very high.

On March 21 Respondent hired Chad Clopton. Lewis testified that, as indicated by General Counsel's Exhibit 16, the applicant was going to attend the ABC apprenticeship school and he was referred by Steve Cox, who is a supervisor at A & A Electric. Lewis was not sure if A & A Electric was a member of ABC.

On March 21 John Bell, who had been in the Union since 1976, went to a jobsite of Respondent at the University Center at Tulsa. Bell testified that he spoke with a John Buss in Respondent's trailer, asking him if he, Bell, could make an application; that Buss told him that he, Bell, needed to go to Respondent's office; that he went to Respondent's facility but Lewis was not there and the receptionist told him that it might be better to catch Lewis the next morning; and that he did not recall seeing any signs posted when he was in the office.

On March 22 at about 8 a.m. Bell went back to Respondent's facility. He testified that he was with Lawrence Crouse; that Lewis came to the reception area and asked them what they wanted; that they told Lewis that they wanted to apply for the job at the University Center; that Lewis said that Respondent was not taking applications at that time because it was getting ready to lay off at the end of the month; that Lewis said that Respondent was slowing down; that although they asked for one, Lewis did not give them applications to fill out, indicating that applications were only good for 14 days; and that he was not hired by Respondent. On cross-examination Bell testified that he surreptitiously tape recorded the conversation he had with Lewis; that he has worked for Respondent; that he did not recall whether there was a sign up when he went to Respondent's office on March 22; and that Lewis did not say that Respondent had jobs over at "OSU" or that jobs were ready to come out with one at Sheffield Steel. On redirect Bell testified

that he worked for Respondent in about 1979; and that at the time Respondent was a union contractor. Crouse testified that he has been a member of the IBEW for 30 years; that he was a journeyman in 1994; that he had worked for Respondent in 1984 or 1985 when it was a union contractor; that he did not see any signs at Respondent's office; that he asked Lewis for an application and Lewis said that he was not accepting applications; that he was wearing his union insignia on a pencil and possibly a hat; and that he did not get hired at Respondent. On cross-examination Crouse testified that when he and Bell asked the secretary about employment she said something about she would have to see and she left the room. Lewis testified that he told Bell and Crouse that he "[a]nticipated reduction in personnel." When called by Respondent Lewis testified that the sign which indicated that applications were not being taken was posted in the lobby on March 22; that he had a discussion with Bell and Crouse in the lobby; that he recognized Crouse who had worked for Respondent several times; that he told Bell and Crouse "we're kind of betwixt and between, that it looks like there's maybe a possibility that we may have a down . . . [turn] and we may have to reduce some of our people in the foreseeable future"; and that he mentioned some projects that might come up like Sheffield Steel. Further Lewis testified that at the time of this conversation Respondent had two jobs, American Airlines and "Oxy" that were scheduled for completion but both of them were pushed back; that during June Respondent did not add any additional people and Respondent had attrition; that the reduction that he had anticipated in late March was pushed back to the first of August; and that he did not say in March 22 that people were being laid off and no one was laid off at that time. On cross-examination Lewis testified that he told Bell and Crouse that there was a possibility of things slowing down; that it was possible that Respondent was going to be laying off people; and that as pointed out by Respondent's Exhibit 11 and as set forth below notwithstanding the fact that Lewis told Bell and Crouse on March 22 that there was a possibility of layoffs, Respondent hired a number of additional people in March, April, and in May.

On March 24 Respondent hired Timothy Wier. Lewis testified that Weir was hired on March 21; that, as indicated by General Counsel's Exhibit 17, Wier was referred by Alliance Electric which is an ABC contractor and it was indicated that he would attend the ABC apprenticeship school. "Hired 3/21/94" is written at the top of Weirs application and the evaluation has a date of "3/21/94" but General Counsel's Exhibit 2 and Respondent's Exhibit 11, both of which were drafted by Respondent, give March 24 as the hire date.

On March 24 Respondent hired Kirk Shirley. Lewis testified that, as indicated by General Counsel's Exhibit 18, Shirley was referred by Fluor Daniels and he had a high rating from Jim Powell, who was a former employee of Respondent.

On April 1 Respondent rehired Terry Davis. Lewis testified that, as indicated by General Counsel's Exhibit 20, Respondent will rehire whenever it needs experienced journeymen wiremen.

On April 4 Respondent hired Larry Tisdale. Lewis testified that, as indicated by General Counsel's Exhibit 9, Larry Tisdale was recruited by Respondent's former employee Danny Tisdale, to support Respondent's affirmative action program.

On April 4 Respondent hired Anthony Samuel. Lewis testified that, as indicated by General Counsel's Exhibit 19, Samuel was referred by former employee Danny Tisdale. Lewis also testified that Samuel was hired March 27.

On April 5 Respondent rehired James Powell, Lewis testified that, as indicated by General Counsel's Exhibit 22, Powell was a past employee of Respondent.

On April 13 Respondent hired Martin Smemoe. Lewis testified that, as indicated by General Counsel's Exhibit 23, this applicant was referred by ABC fax system.

On April 13 Respondent hired Jim Passmore. Lewis testified that, as indicated by General Counsel's Exhibit 21, Passmore was recruited by Respondent's Don Branch and Passmore was an excellent employee for Respondent previously. When called by Respondent, Lewis testified that Passmore's application, Respondent's Exhibit 8, indicates that Passmore worked in Las Vegas, Nevada, and Lewis was of the opinion that most of the work done in that area is done by union contractors. Also, Lewis pointed out that Passmore's application listed JATC/IBEW under school indicating that he completed 4 years; that Passmore had previously worked for Respondent when it was a union contractor; and that Passmore indicated in the application that he was a disabled Vietnam veteran, which is something that Respondent tries to be sensitive about.

On April 16 Respondent hired Jamie Knight. Lewis testified that, as indicated by General Counsel's Exhibit 24, this applicant was referred by Terry Clark, who is one of Respondent's supervisors.

On April 25 Respondent hired Joe Meadors. Lewis testified that, as indicated by General Counsel's Exhibit 25, this applicant was referred by Bill Jones of Allen Electric, which is a member of ABC.

On May 5 Respondent hired William Berger. Lewis testified that, as indicated by General Counsel's Exhibit 31, the applicant was formerly employed by Respondent.

On May 9 Respondent hired Donald Scott Thomas. Lewis testified that, as indicated by General Counsel's Exhibit 26, this applicant was referred by Respondent's employee Joe Meadows and Allen Electric, which as indicated above, is a member of ABC.

On May 9 Respondent hired Jerald Phipps. Lewis testified that, as indicated by General Counsel's Exhibit 27, this applicant's source was Respondent's employee Bill Rodden.

On May 9 Respondent hired Richard Tweed. As noted above, Tweed filed his application on February 21. Lewis testified that, as indicated by General Counsel's Exhibit 30, this applicant was to attend apprenticeship school, that the school was the ABC school and, as noted above, that the source that this applicant lists is the ABC school.

On May 11 Respondent hired Gregory Espinosa. Lewis testified that, as indicated by General Counsel's Exhibit 28, this applicant was referred by Don Stafford of C & D Electric, which is an agency employer, and applicant had 4 years with the ABC apprenticeship program.

On May 25 Respondent hired Nakia Brownfield. Lewis testified that, as indicated by General Counsel's Exhibit 29, this

applicant was recommended by Respondent's supervisor George Tracy.

On June 7 Gary Stottlemyre II, who had been a member of the IBEW for 7 years, went to Respondent's facility and asked for an application even though he saw a sign posted which indicated "APPLICATIONS ARE NOT BEING ACCEPTED AT THIS TIME." He testified that the secretary asked him to wait a minute; that she left and Lewis came out and approached him; that he introduced himself to Lewis and said that he was there to fill out an application for employment; that Lewis said the name sounded familiar to him and Lewis asked him if his father was a member of the Union; that he answered yes to Lewis' question and Lewis asked him if he had other family members who were electricians; that when he told Lewis he needed a job Lewis said "couldn't . . . [his] union help . . . [him]"; that he told Lewis that he was dropped from the Union's apprenticeship program upon his return from being incarcerated for possession of marijuana with intent to distribute; that Lewis referred him to the sign which indicated that Respondent was not accepting applications; that Lackey told him to apply at Respondent; and that he did not fill out an application at Respondent and he was not hired by Respondent. On cross-examination Stottlemyre testified that he was sentenced to prison for 5 years for selling dangerous drugs; that he was on parole at the time of his discussion with Lewis; and that his father is a State Representative but he did not recall discussing this with Lewis. Lewis testified that the "APPLICATIONS ARE NOT BEING ACCEPTED AT THIS TIME" sign was posted that day; that the receptionist told him that Stottlemyre demanded to talk to someone; that he pointed the sign out to Stottlemyre; that Stottlemyre said that he needed a job to get into the Union and his father was a State Representative; that he did not ask Stottlemyre about his father, grandfather, or uncle being a member of the Union; and that Stottlemyre brought up the subject of the Union.

Lewis testified that the National Labor Relations Board requested Respondent to prepare an evaluation sheet to show how it rated applicants so that the Board could evaluate Respondent's evaluation process. The evaluation sheet was received as Respondent's Exhibit 10.

On January 11, 1996, Lackey applied for a position with Respondent, Respondent's Exhibit 9. Lewis points out that the application lists the Union as a past employer and gives a job title of organizer. Lewis testified that when Respondent hired Lackey he was pretty well established as a charging party, an organizer for the Union, and the former president of the Union.

ANALYSIS

Paragraph 5 of the complaint alleges that about June 7, Respondent, by Lewis, at the facility, interrogated job applicants concerning their union membership, activities and sympathies, and the union membership, activities and sympathies of others. General Counsel, on brief, contends that Respondent's sole witness, Lewis, is not a credible witness and that where there is a conflict in testimony, resolutions should be made in favor of General Counsel's witnesses; and that Lewis' questioning of Stottlemyre about whether his father and other members of his family are members of the Union was unlawful. Respondent, on brief, argues that Stottlemyer's belligerence with the receptionist extended to Lewis whom Stottlemyre threatened with his politically-connected family if Lewis did not give him a job; and that the testimony of Lewis should be credited. Lewis is not a credible witness in that even after viewing the videotape he was incapable of admitting what everyone present heard him say on the tape. Contrary to Lewis' assertion he did not say that the application process was shut down. Lewis specifically said "[w]e've got jobs shut down." In other words, after seeing his image and hearing his words he was willing to testify that he said something other than what was on the videotape. Under these circumstances, the testimony of Stottlemyre is credited. Stottlemyre did not threaten Lewis. The receptionist did not testify so we have only Lewis' testimony that Stottlemyre was belligerent to her. As noted above, in other situations the receptionist went to Lewis when someone came to Respondent's facility looking for a job and the no application sign was posted. It is not asserted that on those occasions the receptionist went to Lewis because the person looking for a job was belligerent. In other words, there was a practice of the receptionist going to Lewis and Lewis speaking to someone looking for a job when the sign was posted. When Lewis asked the questions which Stottlemyre testified about Respondent violated the Act as alleged in the complaint.

Paragraph 6(a) of the complaint alleges that about January 13 Respondent refused to employ job applicant Larry Spencer Jr. General Counsel, on brief, contends that only after Spencer answered Lewis indicating that he was a union apprentice did Lewis point to the no applications sign; that Spencer fell victim to a new weapon in the merit shop contractor's arsenal, the "no applications sign"; and that the sign was effectively used to keep Spencer from filling out an application. Respondent, on brief, argues that it is irrelevant when Lewis pointed to the sign and made a statement for a number of reasons, namely, Spencer testified that the sign was posted, Lewis considered Spencer a potential candidate for the Talking Leaves job and urged him to stay in touch and Lewis sought a journeyman wireman and not an apprentice when he hired Terry Clark on January 12.

The "APPLICATIONS ARE NOT BEING ACCEPTED AT THIS TIME" sign is no more than a screening tool. Notwithstanding its presence, time and time again the receptionist went in and spoke with Lewis when someone came looking for a job. Lewis would then speak with the person. If the sign meant what it said and if it was meant to serve its ostensible purpose, there would be no need for the receptionist to go in the back and have Lewis come out to the lobby. Other than Stottlemyre, Respondent is not taking the position that Lewis came to the lobby because the person seeking a job was belligerent or asked to see him. As stated by the Board in *Fluor Daniel, Inc.*, 311 NLRB 498 (1993):

> In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board set forth its test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's action. The burden then shifts to the employer to demonstrate that the same action would have taken place

> notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be based on the Board's review of the record as a whole. [Footnotes omitted.]

Contrary to the argument of Respondent on brief, it is relevant when Lewis pointed to the sign and made a statement. Spencer testified that the sign was posted. Lewis conceded this. There was no apparent reason for Lewis to speak to Spencer other than to screen him. Lewis testified that on January 12 the Talking Leaves project was in the same period of growth as when Holloway left the project on January 17, when Lewis told Holloway that he needed employees—"all the help he could get." This conflicts with Lewis statement to Spencer that the project manager on the job said that Respondent did not need any help at the time. Spencer was never told that he was a potential candidate for the Talking Leaves job. He was only told to stay in touch because Respondent might need some help "down there." With his questions Lewis found out that Spencer was union. Although the argument has not been made, Lewis was not questioning Spencer to find out if he could fill a journeyman's position vis-à-vis an apprentice position at Talking Leaves. Lewis testified that the evening before he talked with Spencer he, Lewis, hired Terry Clark for a journeyman's position. With respect to future positions, Lewis never fully explained why he would take an application from Richard Tweed on February 21, hold the application, and hire Tweed on May 9. It appears that Tweed's circumstances involved schooling. Nonetheless, such treatment is disparate in that if Respondent was truly considering Spencer for future employment at Talking Leaves, why did it not accord the same opportunity to Spencer as it did to Tweed. Lewis found out that Spencer was affiliated with the Union. With few exceptions, which are treated below, those hired by Respondent during the involved period were known individuals in that they were referred to Respondent by a source or they were former employees of Respondent. In my opinion, this, along with the above-described unlawful interrogation which shows antiunion animus, is sufficient to support a prima facie case. General Counsel has established that Respondent unlawfully refused to hire Spencer. Respondent has not shown a business justification for the refusal. Respondent violated the Act as alleged in paragraph 6(a) of the complaint.

Paragraph 6(b) of the complaint alleges that about January 12 Respondent refused to employ job applicants Lonnie Turnipseed and Cecil Blackwood. General Counsel, on brief, contends that the term "merit employers" has been described as nothing more than a "buzz" word for a nonunion shop, "antithetical to any form of contractual relationship with traditional building trade unions," *J. E. Merit Constructors*, 302 NLRB 301, 304 (1991); that the Board has noted that it would be inconsistent with the goals of a merit shop employer to "open its doors with equanimity to qualified craftsmen who overtly manifested an intention to organize . . . ." *Town & Country Electric*, 309 NLRB 1250, 1263 (1992); that in the instant matter the Respondent established a screening system which made it virtually impossible to knowingly hire a union applicant; that Respondent's hiring list is replete with references from its own employees, supervisors, other ABC contractors, the ABC fax system and the well known nonunion contractor Fluor Daniel; and that under these circumstances, Turnipseed and Blackwood did not stand a chance. Respondent, on brief, argues that at the time Talking Leaves was the only project for which Respondent was hiring, the job requires a CDIB card and Turnipseed did not have the card; that General Counsel's argument that Turnipseed was rejected because he worked for a union contractor at American Airlines has no merit in logic or evidence; that Terry Clark was chosen over Blackwood because Terry Clark possessed qualifications that were superior to Blackwood's, namely, Clark was a working foreman and he lived closer to the job than Blackwood; that Lewis demonstrated that he considered Blackwood without discriminatory motivation when he told Blackwood he would hire him if Clark was not selected for the job; that the Act never intended to give preferential treatment to an individual because of protected activity; and that General Counsel's argument that Blackwood should have been hired because of his known union affiliation fails because the successful applicant was also known to be union affiliated.

In my opinion General Counsel has made a prima facie case with respect to Turnipseed in that he has shown that Turnipseed engaged in protected activity, Respondent knew and there is antiunion animus on the part of Respondent. Respondent has come forward with a business justification, namely, Turnipseed does not have a CDIB card and on January 12 the only job that Respondent was hiring for was Talking Leaves, which required such a card. But there is a flaw in Respondent's position in that Respondent could have held the application until it had a need for a journeyman who did not have a CDIB. According to Respondent's Exhibit 11 such a need arose on January 31, a little over 2 weeks after Turnipseed submitted his application. Again, Respondent, in effect, held Tweed's application for over 2-1/2 months before hiring him. This is disparate treatment. Respondent has not demonstrated that it would have taken the action it did regarding Turnipseed absent his protected activity.

General Counsel also made a prima facie case regarding Blackwood in that he has shown that Blackwood engaged in protected activity, Respondent knew and there is antiunion animus on the part of Respondent. Respondent has come forward with a justification. However, Respondent was not faced with just making a choice between Blackwood and Terry Clark. According to Respondent's Exhibit 11 it hired a journeyman for the Talking Leaves project on February 14. Again, Respondent, in effect, held Tweed's application for over 2-1/2 months before hiring him. It could have held Blackwood's. To do otherwise amounts to disparate treatment. Respondent has not demonstrated that it would have taken the action it did regarding Blackwood absent his protected activity. Respondent violated the Act as alleged in paragraph 6(b) of the complaint.

Paragraph 6(c) of the complaint alleges that about February 21 Respondent refused to employ job applicant Kevin Stone. General Counsel, on brief, contends that Respondent's merit shop considerations entered the picture and Stone was rejected

for hire because he had been receiving higher wages at a prior union employer than Respondent was willing to pay; that the Board has recognized that the listing of prior union employers and "of pay at union scale" is a clear indication of the union background of applicants, *Ultrasystems Western Constructors*, 310 NLRB 545 fn. 2 (1993); and that Lewis' implausible descriptions of Stone's travel being a positive and a negative factor underscore the unlawful motivation displayed by Lewis. Respondent, on brief, argues that Stone had previously worked for Respondent but did not so state this on his application; that Lewis' confidence that the no application sign was not posted on February 21 is corroborated by the application completed by Tweed on the same day; that the $19.25 wage rate earned by Stone in Colorado Springs would not put Lewis on notice that Stone worked for a contractor which was union because it could have involved the prevailing wage rate work since it was in Colorado Springs where the Air Force Academy is located; and that Stone did not believe that there was anything on his application which would have tipped Lewis off that he, Stone, was in the Union.

Contrary to Respondent's assertion on brief, Stone did indicate on his application that he had previously worked for Respondent. Stone did not include Respondent in the employment history portion of the application but he did indicate on the front of the application, in answer to questions on the application, that he worked for Respondent in the past and he gave the years. Lewis testified that he chose Dick over Stone because of Dick's track record with Respondent. Lewis also testified that he overlooked Stone's indication on the front of his application that he had worked for Respondent before. Stone testified that he discussed his past employment at Respondent with Lewis when he, Stone, submitted the application. Stone is credited. However, Lewis did not compare the track records of Stone and Dick. Why? Stone is also credited with respect to the "APPLICATIONS ARE NOT BEING ACCEPTED AT THIS TIME" sign being posted when he returned at 1 p.m. on February 21. Lewis is not a credible witness. And the receptionist was not called by Respondent. This raises a second question. Why did Lewis take Stone's application when the sign was up? Perhaps it was done because Tweed's application was taken while the sign was up. Tweed was an ABC referral and he was not going to be immediately hired. In other words, his application was not taken in terms of filling an immediate need. His application would not have been taken because the sign was down. The sign was up that day. And when Lewis was faced with Stone wanting to submit an application he decided to take it. Stone submitted his application on February 21. Dick submitted his application on February 25. More than once in the evaluation of Stone Lewis referred to Stone working at high wage or high paying jobs. Additionally, Stone testified that he used "union terms" in his conversation with Lewis in that he, Stone, said "time" and "scale." In my opinion Lewis had sufficient reason to suspect that Stone was union. Whether he acted on this suspicion or made further inquires does not matter. General Counsel has made a prima facie showing regarding Stone in that it has been demonstrated, in my opinion, that Respondent proceeded with the understanding that Stone was with the Union. Also, as noted above, there is antiunion animus on the part of Respondent. On the other hand, Respondent has not come forward with a business justification since it alleges that it chose Dick over Stone because of the former's track record. Respondent refused to compare the track records of these two at Respondent. Consequently track records at Respondent were not the determining factor. Additionally, Respondent hired two journeymen the first week of March. Respondent does not satisfactorily explain why it did not hold Stone's application and consider him for those positions. In addition to holding Tweed's application it is noted that Respondent also held another apprentice's application, Larry Tisdale, for over a month. Respondent violated the Act as alleged in paragraph 6(c) of the complaint.

Paragraph 6(d) of the complaint alleges that about March 1 Respondent refused to employ job applicant Virgil Holloway. General Counsel, on brief, contends that Holloway was not rehired because he was Union and he talked about the Union at the Talking Leaves project; and that this was made clear by the comments of Lewis regarding the people who he did hire in that Jackie Dick was rehired with the notation that Respondent will rehire when needing journeymen help and Terry Davis was rehired with the notation that the Respondent will rehire experienced journeymen wirers whenever needed. Respondent, on brief, argues that Holloway's last moment interrogation allegation regarding Cheney is not worthy of belief; that even if Holloway's supervisor illegally interrogated him, there was no retaliation by the supervisor or any evidence that it was made known to Lewis; that Lewis had a pattern and practice of hiring applicants with union affiliation and Lewis hired Lackey, the union's organizer; that Lewis also has an uncontested practice of not rehiring employees who leave a job before the job is completed; that Holloway's testimony regarding what Lewis said demonstrates conclusively that Lewis' decision was motivated by Holloway's early departure from the job, not any protected activity that may or may not have occurred on the job.

Cheney did not testify to deny that he asked Holloway if he was a member of the Union. Holloway's testimony on this point is credited. General Counsel does not have to prove that Lewis was told. Cheney's knowledge is imputed. The fact that Respondent hired Lackey carries no weight since this occurred in 1996 well after Lackey filed a charge in this proceeding (March 1994). Holloway left the Talking Leaves project on January 17. According to Respondent's Exhibit 11, Respondent did not hire another journeymen wireman for the Talking Leaves job until February 14, almost a month later. And it appears that Respondent chose not to consider Blackwood, who submitted an application 5 days before Holloway left, for the vacated position. Lewis did not deny that at one point he indicated that applications are good for 14 days. If Lewis did not consider Blackwood to replace Holloway, was Lewis really considering Blackwood, notwithstanding what he told Blackwood, for a position on January 12? Respondent was not left in a lurch by Holloway's departure. General Counsel has made a prima facie case in that he has shown that Holloway engaged in union activity, Respondent knew and there is antiunion animus on the part of Respondent. Respondent has come forward with a business justification in that Lewis cited other specific instances where Respondent would not rehire employees who left

the job and later tried to return. While Respondent does rehire, it was not shown that any of those rehired were rehired under circumstances similar to those involved here, namely, an employee's departure to take a higher paying job with the employee telling management that was the reason he was leaving. Paragraph 6(d) of the complaint will be dismissed.

Paragraph 6(e) of the complaint alleges that about March 1 Respondent refused to employ job applicants Chris Arena, Roger Harris, Mile Highwood, Dan Miller, Gerald Molloy, Jim Rogers, Dennis Lawrence, Weldon Long, Lawrence Houser, Steve Morgan, Kenneth Nelson, Ron Pitman, Roy Sheppard, Dana Benton, Bobby Risenhoover, Danny Risenhoover, Dusty Oldham, Jerry Porter, Gary Ward, Jim Pitts, and Charles Lackey Jr. General Counsel, on brief, contends that members of the group wore the clear markings of the Union and Michael Blanchard introduced them as union electricians; that none of the men present were allowed to apply and none were hired; that the list of hires by the Respondent shows that at the time this group of union electricians was told jobs are shutdown, Respondent was actively hiring journeymen and apprentices; and that three journeymen and six apprentices were hired between March 1 and 22. Respondent, on brief, argues that neither Blanchard nor anyone else announced to Lewis that the group was union affiliated and Lewis testified without contradiction or rebuttal that he did not remember union paraphernalia; that there is no testimony that the group was wearing union indicia on March 1 and that it was observed by Lewis; and that Respondent has submitted uncontradicted and unrebutted testimony that the same action would have taken place notwithstanding protected activity.

At one point during the conversation which was captured on the videotape Lewis, in addressing the spokesman of the group, said "Mike, Mike Blanchard." This would indicate either that Lewis knew the individual or that Lewis had previously been given the name of the individual. The video does not have Blanchard giving his name to Respondent's personnel. But there is a gap in the tape in that when Lewis first appears in the tape he is standing at the counter. With each preceding representative of Respondent they are shown on the tape entering the room and walking up to the counter. It is possible that during the gap in the tape Blanchard introduced himself to Lewis. Nonetheless, at the end of the tape Lewis is heard telling those in the lobby to save the video because he was going to have it subpoenaed. At this point Lewis did not ask who he would subpoena. He knew who was occupying his lobby that day. General Counsel has made a prima facie case in that he has established that those seeking to submit applications on March 1 were affiliated with the Union, that Lewis knew this and there is antiunion animus on the part of Respondent. Respondent has not come forward with a business justification in that it had in the past taken an application when the "APPLICATIONS ARE NOT BEING ACCEPTED AT THIS TIME" sign was up. As pointed out by General Counsel and Respondent's Exhibit 11, during the 20 days following what occurred on March 1, Respondent hired a number of individuals. Yet it did not hire any of the individuals who asked to submit an application on March 1. Respondent held the applications of other individuals and, as noted, at one point Lewis testified that applications are good for 14 days, yet it was unwilling to hold the applications of those in its lobby on March 1. Respondent violated the Act as alleged in paragraph 6(e) of the complaint.

Paragraph 6(f) of the complaint alleges that about March 22 Respondent refused to employ job applicants Lawrence Crouse and John Bell. General Counsel, on brief, contends that while Lewis told Crouse and Bell that he anticipated a reduction in personnel, between March 24 and May 25 Respondent hired 14 people, including 8 journeymen; and that those who were hired were referred by Fluor Daniel, the ABC fax system, ABC members and supervisors of the Respondent. Respondent, on brief, argues that Lewis had the "no application" posted because he legitimately feared a pending reduction in force; and that he was subsequently proven to be incorrect is irrelevant and typical, and not surprising in the construction industry.

In the past when the sign was up Lewis referred to the sign when telling union members that applications were not being taken. He is seen doing this on the videotape. Lewis did not testify that he did that here. Rather, Lewis conceded that he told Bell and Crouse that he anticipated a reduction in personnel. As concluded above, Lewis is not a credible witness. Bell is credited. Lewis told Bell and Crouse that he was getting ready to lay off at the end of the month. Just as he did while being videotaped on March 1, he was less than truthful in describing Respondent's situation at the time. The "APPLICATIONS ARE NOT BEING ACCEPTED AT THIS TIME" sign was not up on March 22. Respondent's receptionist was not called to testify on this point. As conceded by Lewis on cross-examination, Respondent hired one person later in March, six in April and six in May. Lewis also did not deny that he told Bell and Crouse that applications were good for 14 days. That being the case, Respondent filled two journeymen wire positions on April 1 and April 5. If Bell and Crouse had been allowed to submit applications on March 22, these two positions would have fallen within the 14 days specified by Lewis. Crouse was wearing a union insignia where it could be seen by Lewis. General Counsel has made a prima facie case in that he has shown that Bell and Crouse were engaged in protected activity, with the union insignia in front of him Lewis was aware that he was dealing with the Union and there is antiunion animus on the part of the Respondent. Lewis is not credited with respect to the "APPLICATIONS ARE NOT BEING ACCEPTED AT THIS TIME" sign being posted. And once again he was less than truthful in giving his reason for refusing to even allow Bell and Crouse to submit applications. Respondent has not shown a business justification for its refusal to hire Bell and Crouse. Respondent violated the Act as alleged in paragraph 6(f) of the complaint.

Paragraph 6(g) of the complaint alleges that about June 7 Respondent refused to employ job applicant Gary Stottlemyre. General Counsel, on brief, contends that Stottlemyre was confronted with the same no application sign and effectively screened out by the Respondent in violation of the Act. Respondent, on brief, argues that according to Respondent's Exhibit 11, Respondent accepted no applications on June 7 or at any time thereafter "to the remainder of the month"; and that if Stottlemyre is credited, Respondent has met its burden by demonstrating the same action would have taken place notwith-

standing any protected conduct in which Stottlemyre may have engaged.

General Counsel has made a prima facie case in that he has shown that Lewis knew that Stottlemyer was union and there is antiunion animus on the part of the Respondent. On the other hand, Respondent has not come forward with a sufficient business justification in that at least one application had been taken while the no application sign was up, according to Respondent's policy applications are "good" for up to 14 days, and, as noted above, Respondent has held applications for an extended period of time before hiring the individual. Lewis testified about the fluctuations in the involved business. Fluctuations can go either way. With respect to why Lewis ended up speaking to Stottlemyre when the sign was up, the receptionist did not testify and therefore we have only Lewis' testimony that Stottlemyre demanded to see someone. As noted above, in my opinion Lewis is not a credible witness. Stottlemyre testified that he saw the "APPLICATIONS ARE NOT BEING ACCEPTED AT THIS TIME" sign but since he drove "all the way out there" he asked if he could fill an application out. According to Stottlemyre's testimony, the secretary "just said 'Wait a moment, please,' and she left and then Mr. Lewis appeared," Stottlemyre's testimony is credited. Again, Lewis came out to the lobby to screen the individual. Even though Stottlemyre spoke about being dropped from the Union's apprenticeship program after Lewis asked if Stottlemyre's Union could help him, Lewis told him he could file charges against the Union. Lewis resolved that Stottlemyre was union. And because of that Lewis resolved not to hire Stottemyre. Respondent has not shown that absent Stottlemyre's union affiliation Respondent would have refused to hire him. Respondent violated the Act as alleged in paragraph 6(g) of the complaint.

With respect to the assertion that during the first 6 months of 1994 Respondent did hire five individuals who gave some indication of union affiliation, it is noted that with respect to Huey Wayne Bryant we only have the testimony that someone who identified himself as Bryant's uncle said "[w]ell, yeah, he's a good—he's a good, hard worker . . . [t]he only thing about Wayne, he likes—he moves around quite a bit and he likes to work union"; that Lewis is not a credible witness and this hearsay is not entitled to any weight; that Respondent's employee Robert Wayne Clark referred Terry Clark and Bill Fryar, both of whom previously worked for Respondent in 1992 and 1990, respectively, which is subsequent to the time that Respondent ceased being a party to an agreement between the Union and NECA; that Lewis testified that in 1994 before Terry Clark was rehired, Wayne Clark did not say anything about Terry Clark's affiliation with the Union; that no employment history was introduced regarding Vaughn Bearden who worked for Respondent in 1978 and 1979; and that the fifth individual, Jim Passmore, was hired after Lackey filed the charge in 17–CA–17290 on March 24 alleging that since January 1, Respondent refuses to employ applicants who are known union sympathizers. Neither these nor others cited by Respondent, i.e., the hiring of Lackey in 1996, demonstrate that union electricians have been employed even though Respondent has become a merit shop contractor. The electricians Respondent employs are carefully screened and those who Lewis perceives to be actively affiliated with the Union are screened out. Those union affiliated electricians hired after the above-described charge was filed in March 1994, demonstrate only that when Respondent was faced with additional charges of unfair labor practices did it start to hire union affiliated electricians.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by interrogating a job applicant concerning his union membership, activities and sympathies, and the union membership, activities and sympathies of others.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to employ job applicants Larry Spencer Jr., Lonnie Turnipseed, Cecil Blackwood, Kevin Stone, Chris Arena, Roger Harris, Mile Highwood, Dan Miller, Gerald Molloy, Jim Rogers, Dennis Lawrence, Weldon Long, Lawrence Houser, Steve Morgan, Kenneth Nelson, Ron Pitman, Roy Sheppard, Dana Benton, Bobby Risenhoover, Danny Risenhoover, Dusty Oldham, Jerry Porter, Gary Ward, Jim Pitts, Charles Lackey Jr., Lawrence Crouse, John Bell, and Gary Stottlemyre II.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as found herein, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

Having found that the Respondent unlawfully discriminated against 28 job applicants, it will be recommended that Respondent offer them employment to positions at projects in the Tulsa, Oklahoma area, and Respondent shall make the 28 job applicants whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful discrimination against them, from the date they applied for employment, to the date that the Respondent makes them a valid offer of employment. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Other considerations regarding the Remedy and the specifics of the relief granted must wait until the compliance stage of the proceeding as indicated in *Dean General Contractors*, 285 NLRB 573 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recom-

ORDER

The Respondent, Oil Capital Electric, of Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating a job applicant concerning his union membership, activities and sympathies, and the union membership, activities and sympathies of others.

(b) Refusing to employ job applicants Larry Spencer Jr., Lonnie Turnipseed, Cecil Blackwood, Kevin Stone, Chris Arena, Roger Harris, Mile Highwood, Dan Miller, Gerald Molloy, Jim Rogers, Dennis Lawrence, Weldon Long, Lawrence Houser, Steve Morgan, Kenneth Nelson, Ron Pitman, Roy Sheppard, Dana Benton, Bobby Risenhoover, Danny Risenhoover, Dusty Oldham, Jerry Porter, Gary Ward, Jim Pitts, Charles Lackey Jr., Lawrence Crouse, John Bell, and Gary Stottlemyre II because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Larry Spencer Jr., Lonnie Turnipseed, Cecil Blackwood, Kevin Stone, Chris Arena, Roger Harris, Mile Highwood, Dan Miller, Gerald Molloy, Jim Rogers, Dennis Lawrence, Weldon Long, Lawrence Houser, Steve Morgan, Kenneth Nelson, Ron Pitman, Roy Sheppard, Dana Benton, Bobby Risenhoover, Danny Risenhoover, Dusty Oldham, Jerry Porter, Gary Ward, Jim Pitts, Charles Lackey Jr., Lawrence Crouse, John Bell, and Gary Stottlemyre II employment in positions for which they applied or if such positions no longer exist, to substantially equivalent positions, and make them whole for any loss of earnings and other benefits that they may have suffered as a result of the discrimination against them, as set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files and expunge any and all references to the unlawful refusal to employ the 28 discriminatees named above, and notify them that this action has been taken and that the refusal to hire will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Tulsa, Oklahoma facility the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., May 19, 1997

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate a job applicant concerning his union membership, activities and sympathies, and the union membership, activities and sympathies of others.

WE WILL NOT refuse to employ job applicants because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Larry Spencer Jr., Lonnie Turnipseed, Cecil Blackwood, Kevin Stone, Chris Arena, Roger Harris, Mile Highwood, Dan Miller, Gerald Molloy, Jim Rogers, Dennis Lawrence, Weldon Long, Lawrence Houser, Steve Morgan, Kenneth Nelson, Ron Pitman, Roy Sheppard, Dana Benton, Bobby Risenhoover, Danny Risenhoover, Dusty Oldham, Jerry Porter, Gary Ward, Jim Pitts, Charles Lackey Jr., Lawrence Crouse, John Bell, and Gary Stottlemyre II employment in positions for which they applied or if such positions no longer exist, to substantially equivalent positions, and make them whole for any loss of earnings and other benefits that they may have suffered as a result of the discrimination against them.

WE WILL remove from our files and expunge any and all references to the unlawful refusal to employ the 28 discriminatees named above, and notify them that this action has been taken and that the refusal to hire will not be used against them in any way.

OIL CAPITAL ELECTRIC

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mended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.